91-990

No. _____.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,

Petitioners,

versus

WILLIAM P. HOBBY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 42 U.S.C. § 1988 authorize the award of reasonable attorney's fees to civil rights plaintiffs who recover nominal damages?

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OPINIONS BELOW

The Fifth Circuit's first opinion directed the award of nominal damages to petitioners. *Farrar v. Cain*, 756 F.2d 1148 (5 Cir. 1985) (Pet. App. 2). On remand, the district court awarded attorney's fees to petitioners in an unreported memorandum and order (Pet. App. 12, 13, 29).

The Fifth Circuit's second opinion reversed, on the theory that plaintiffs recovering nominal damages for federal civil rights violations are not "prevailing parties," and therefore are not entitled to attorney's fees under 42 U.S.C. § 1988, because they have gained only "a *de minimis* or technical victory." *Estate of Farrar v. Cain*, 941 F.2d 1311, 1315 (5 Cir. 1991) (Pet. App. 30).

JURISDICTION

The opinion and judgment of the court of appeals were entered on September 17, 1991 (Pet. App. 30, 46). This petition for certiorari was filed within 90 days thereafter and is timely. The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (Pet. App. 47).

STATEMENT OF THE CASE

Joseph Farrar and his son Dale sued Respondent William P. Hobby and other public officials under 42 U.S.C. § 1983.[1] They alleged, among other claims, that the defendants violated their right to due process of law by illegally closing a school they operated in Liberty County, Texas. The jury returned a verdict finding that Hobby violated Joseph Farrar's federal civil rights under color of state law, but awarded no damages for that violation. The district court entered a

[1] Joseph Farrar died before trial. Petitioners, as co-administrators of his estate, were ordered substituted as plaintiffs under F.R.Civ.P. 25(a) (Pet. App. 1).

take-nothing judgment on the jury's verdict.

Relying on *Carey v. Piphus*, 435 U.S. 247 (1978), the Fifth Circuit reversed:

> Even when a violation of a civil right causes no actual injury to the plaintiff, the plaintiff is entitled to recover nominal damages. We have awarded nominal damages, not to exceed one dollar, when an infringement of a fundamental right was shown and we have also held that, once a jury has found a violation of a plaintiff's civil rights, it "could not ignore that finding in calculating damages. Violation of [the plaintiff's] constitutional rights was, at a minimum, worth nominal damages."[2] Because the jury explicitly found that defendant Hobby had violated Farrar's civil rights, the jury should have awarded Farrar nominal damages, not to exceed one dollar, and it was error for the trial court not to do so when the Farrars so moved in their motion for a new trial.

Farrar v. Cain, 756 F.2d 1148, 1152 (5 Cir. 1985) (citations omitted) (Pet. App. 10).

On remand, petitioners filed an application for attorney's fees under 42 U.S.C. § 1988. Following a lengthy hearing, the district court awarded to them against Hobby $280,000.00 in attorney's fees, $27,932.00 in costs and expenses, and prejudgment interest (Pet. App. 12).

[2] *Webster v. City of Houston*, 689 F.2d 1220, 1230 (5 Cir. 1982), *vacated and remanded on other grounds*, 735 F.2d 838 (5 Cir. 1984), *aff'd in part and rev'd in part*, 739 F.2d 993 (5 Cir. 1984).

Hobby appealed. A different panel of the Fifth Circuit, one judge dissenting, reversed the fee award, holding that petitioners were not "prevailing parties" within the meaning of 42 U.S.C. § 1988. The Fifth Circuit acknowledged that "[o]ur holding today conflicts with opinions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits." 941 F.2d at 1316 (Pet. App. 41). It conceded the principle, established by *Carey v. Piphus*, 435 U.S. 247 (1978), that "[a] violation of constitutional rights is never *de minimis*," because it is never "so small or trifling that the law takes no account of it." 941 F.2d at 1315, quoting *Lewis v. Woods*, 848 F.2d 649, 651 (5 Cir. 1988) (Pet. App. 40).

Nonetheless, without citing or even mentioning *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the panel majority interpreted *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989), *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988) collectively to mean that a civil rights plaintiff recovering nominal damages has attained only a *de minimis* or technical victory, and therefore is not a "prevailing party" under § 1988. 941 F.2d at 1316 (Pet. App. 41). The court reasoned that a plaintiff "prevails" within the meaning of § 1988 only when the final decision changes "the legal relationship between the parties in a way that alters the defendant's behavior toward the plaintiff and that secures some of the relief sought by the plaintiff in bringing the suit." 941 F.2d at 1317 (Pet. App. 45). The panel concluded that "the recovery of one dollar is no victory under § 1988" and that "the plaintiff's victory, *as measured by the success actually obtained*, was merely a *de minimis* or technical success." 941 F.2d at 1315-16 (footnote omitted; emphasis added) (Pet. App. 40-41).

Petitioners did not seek panel rehearing or suggest rehearing en banc. Because its decision created an intercircuit conflict, the Fifth Circuit "circulated the opinion to the entire court as required by the court's policy. No member of the court has requested en banc consideration." 941 F.2d at 1316 n. 22 (Pet. App. 41).

REASONS FOR GRANTING CERTIORARI

1. As the Fifth Circuit concedes, its decision is in conflict with the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, all of which have held that a plaintiff's recovery of nominal damages for a federal civil rights violation supports the award of reasonable attorney's fees under 42 U.S.C. § 1988.

The Fifth Circuit's opinion pointedly acknowledges that the Second,[3] Seventh,[4] Eighth,[5] Ninth,[6] Tenth,[7] and Eleventh[8] Circuits all have concluded that a plaintiff recovering nominal damages is a "prevailing party" entitled to claim reasonable attorney's fees under § 1988. The Fourth Circuit and an intermediate state

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[3] *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2 Cir. 1991).

[4] *Smith v. DeBartoli*, 769 F.2d 451 (7 Cir. 1985), *cert. denied* 475 U.S. 1067 (1986).

[5] *Coleman v. Turner*, 838 F.2d 1004, 1005 (8 Cir. 1988).

[6] *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9 Cir. 1988).

[7] *Nephew v. City of Aurora*, 830 F.2d 1547 (10 Cir. 1987) (en banc), *cert. denied* 485 U.S. 976 (1988).

[8] *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11 Cir. 1987).

appellate court also have reached that result.[9]

Such virtual unanimity is understandable. Civil rights plaintiffs "prevail" under § 1988 when they "succeed on *any* significant issue in the litigation which achieves *some* of the benefit . . . sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added). A judgment awarding even nominal damages reflects "the importance to organized society that [constitutional] rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). The actual injury and the amount awarded may be trivial or insignificant. The principle at stake is not.

Congress was acutely aware when it enacted the Civil Rights Attorney's Fees Awards Act of 1976 that, in many civil rights cases, the relief at issue is worth less, in monetary terms, than the cost of litigating the claim. H. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at 9. It has authorized the allowance of sufficient compensation to encourage the litigation of meritorious claims, as a matter of national policy, even if the money damages realistically to be won would not otherwise be sufficient to attract competent counsel or to justify a lawsuit at all:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at 2, reprinted in 1976 U. S. Code Cong. & Admin. News 5908 at 5910.

This Court consistently has recognized and implemented this congressional policy. "[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986), quoted in *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). "Congress has determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff." *Hensley v. Eckerhart*, 461 U.S. 424, 444 n. 4 (1983). A plaintiff in federal civil rights litigation acts "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority," *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), and "often secures important societal benefits that are not reflected in nominal or relatively small damage awards." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). Until now, no federal appeals court has ever seriously questioned these principles.

Because the Fifth Circuit's opinion was circulated to all of that court's active judges prior to its publication, and because no judge of that court requested en banc hearing or rehearing, the decision

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[9] *Burt v. Abel*, 585 F.2d 613, 617-18 (4 Cir. 1978); *Tedesco v. City of Stamford*, 24 Conn.App. 377, 588 A.2d 656, 659 (1991); *but see Spencer v. General Electric Co.*, 894 F.2d 651, 662 (4 Cir. 1990) (dictum); *Moran v. Pima County*, 145 Ariz. 183, 700 P.2d 881, 882-83 (1985), *cert. denied* 474 U.S. 989 (1985) (Justice White dissenting).

represents the considered, final judgment of the Fifth Circuit on an issue of undoubted national importance. There is no realistic likelihood that further litigation of the question in the lower federal courts "may help to illuminate [the] issue before it is finally resolved and thus may play a constructive role in the lawmaking process."[10] Answering the question presented involves nothing more than interpreting clear and unambiguous statutory language.

Nor are there any subsidiary reasons why the grant of certiorari here might be improvident or unwarranted. The question presented was squarely and definitively decided, after being capably briefed and argued in the Fifth Circuit by experienced counsel. There are no unresolved jurisdictional or procedural issues. There is no alternative ground for decision. There is no reasonable likelihood that Congress will amend the statute in the absence of a controlling decision from this Court.[11] The passage of time will not moot or alter the character of the question presented in any way.

Finally, the conflict is not of mere technical or abstract philosophical significance. Federal trial courts within the Fifth Circuit historically have decided a substantial proportion of all Title VII, § 1983, and other federal civil rights litigation filed each year in the

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[10] Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982).

[11] Congressional efforts to amend § 1988 to prohibit attorney's fees awards that are disproportionate to the damages recovered have failed twice. See proposed Legal Fees Equity Act, S. 2802, 98th Cong., 2d Sess. (1984), and S. 1580, 99th Cong., 1st Sess. (1985).

courts of the United States.[12] The decision in this case dramatically affects those cases. Even though the federal trial court here viewed an award of attorney's fees as both reasonable and appropriate, the Fifth Circuit's decision effectively overrode that exercise of the district court's traditional discretion.

This case presents a significant circuit conflict. Supreme Court Rule 10.1(a). The Court should grant certiorari to resolve it.

2. The Fifth Circuit's decision is in conflict with *City of Riverside v. Rivera*, 477 U.S. 561 (1986), which was not addressed or even cited in the court's opinion.

The district court based its award of attorney's fees on *City of Riverside v. Rivera*, 477 U.S. 561 (1986). The Fifth Circuit's opinion does not discuss or cite the case. There the Supreme Court "[rejected] the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers," 477 U.S. at 574-76:

> Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial

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[12] The Office of the Circuit Executive of the United States Court of Appeals for the Fifth Circuit has advised counsel that since 1985 the Fifth Circuit has averaged 432 civil rights appeals per year. According to the Administrative Office of the United States Courts, during the fiscal year ending June 30, 1991, the Fifth Circuit decided 480 of 3,844 civil rights appeals (other than prisoner petitions) filed in all United States courts of appeals.

> monetary relief . . . Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages.

The Court in *Rivera* decisively repudiated the idea that entitlement to reasonable attorney's fees under § 1988 is necessarily contingent upon the amount of damages awarded, or that attorney's fees can be denied altogether simply because the compensable constitutional injury may seem slight. "A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988." 477 U.S. at 578.

Indeed, in *Rivera* this Court cited with approval the Fifth Circuit's earlier holding in *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1220 (5 Cir. 1982), that "an attorney's fee award [under § 1988] may be supported by an award of nominal damages since the successful claim serves to vindicate constitutional rights." 477 U.S. at 576 n. 8. *Basiardanes* in turn cites in support of that holding footnote 11 in *Carey v. Piphus*, in which this Court noted that "the potential liability of § 1983 defendants for attorney's fees . . . provides additional — and by no means inconsequential — assurance that agents of the State will not deliberately ignore due process rights." 435 U.S. at 257 (citation omitted).

The Fifth Circuit misconstrued *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989), *Rhodes v. Stewart*, 488 U.S. 1 (1988), and

Hewitt v. Helms, 482 U.S. 755 (1987). The panel majority thought those decisions collectively mean that a plaintiff recovering only nominal damages is not a "prevailing party" under § 1988, at least when damages are the exclusive relief sought. The majority believed that such an award neither "change[s] the legal relationship" between the parties, nor "secures some of the relief sought by the plaintiff in bringing the suit," 941 F.2d at 1317 (Pet. App. 45), but instead constitutes "merely a *de minimis* or technical success." 941 F.2d at 1316 (Pet. App. 41).

Hewitt v. Helms, 482 U.S. 755 (1987) and *Rhodes v. Stewart*, 488 U.S. 1 (1988) do not support the Fifth Circuit. In *Hewitt* the plaintiff obtained only "a favorable judicial statement of the law in the course of litigation that [resulted] in judgment *against the plaintiff*," who otherwise "obtained no relief." 482 U.S. at 760, 763 (emphasis added). In *Rhodes* "[t]he case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever." 488 U.S. at 4. This case is not moot. Petitioners "secured some of the relief sought." In light of *City of Riverside v. Rivera* and *Carey v. Piphus*, an award of nominal damages cannot plausibly be characterized as "no relief whatsoever."

In *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989), the Court held that "a civil rights plaintiff is a prevailing party within the meaning of § 1988" and "has crossed the threshold to a fee award of some kind" if "the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit'." 489 U.S. at 791-92, quoting *Nadeau v. Helgemoe*, 581

F.2d 275, 278-79 (1 Cir. 1978). The Court interpreted this standard to require, "at a minimum . . . a resolution of the dispute which changes the legal relationship" between the parties. The opinion suggested in *dictum* that fees might be denied "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*." *Id.*

The Court cited as an example of "technical or *de minimis*" success the trial court's ruling in *Garland* that a school district policy was unconstitutionally vague, even though there was no evidence it had ever been applied to the plaintiffs. In this case, by contrast, the jury's verdict explicitly found that "Defendant Hobby committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right guaranteed by the Constitution and laws of the United States . . ."

Such a verdict, and the resulting judgment, constitute a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in [§ 1988]. Where such a change has occurred, the *degree* of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, *not to the availability of a fee award vel non*." *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. at 792-93 (emphasis added).

Characterizing as "purely technical or *de minimis*" a civil rights plaintiff's success in obtaining nominal damages for an acknowledged violation of the constitutional right to due process of law is irreconcilable with *Rivera*'s central premise that recovery of attorney's fees in federal civil rights cases is not dependent upon "obtaining substantial monetary

relief." It is likewise inconsistent with this Court's insistence in *Carey v. Piphus* that such an award is not some arcane ceremonial formality but an indispensable recognition of "the importance to organized society that [federal] rights be scrupulously observed." 435 U.S. at 266. In this country, at least, there are no *de minimis* constitutional deprivations.[13]

The conflict between the Fifth Circuit's holding and this Court's decisions in *Carey* and *Rivera* warrants the grant of certiorari. Supreme Court Rule 10.1(c).

3. The Fifth Circuit's denial of any attorney's fees whatever to plaintiffs who prevail in civil rights cases by recovering nominal damages disregards plain statutory language, undermines clearly expressed congressional policy, and presents an important question of federal law that has not been, but should be, settled by this Court.

The Fifth Circuit never reached or even intimated its position on the question of whether the attorney's fees awarded by the district court were "reasonable," in the sense demanded by § 1988. It did not decide whether the award should have been modified or reduced. Instead, it imposed an absolute bar to the recovery of *any* attorney's fees, in *any* amount, by *any* plaintiff awarded only nominal damages, in *any* federal civil rights case in *any* United States district court within the Fifth Circuit. The practical consequences of such an unprecedented holding are significant.

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[13] "The constitutional right transgressed in *Carey* — the right to due process of law — is central to our system of ordered liberty." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986).

1. The decision, if unreversed, will bind each of the federal trial courts in Texas, Louisiana, and Mississippi, and conceivably may be regarded as persuasive authority by state trial and appellate courts considering federal civil rights cases in those and other states as well. At least two United States district courts within the Fifth Circuit, relying on this case, already have refused to award attorney's fees to civil rights plaintiffs recovering nominal damages.[14]

2. The central holding below that recovery of nominal damages does not support a claim for attorney's fees casts substantial doubt on the status of attorney's fees awards under a myriad of other federal statutes. *Cf. United States Football League v. National Football League*, 887 F.2d 408 (2 Cir. 1989), *cert. denied* 493 U.S. 1071 (1990) (award of nominal damages of $1 under Clayton Act, trebled to $3, held to support award of attorney's fees of $5,529,247.25 and taxable costs of $62,220.92).[15] The statutory phrase "prevailing party" or its equivalent necessarily must have a consistent, easily determinable meaning. Congress cannot plausibly have intended the same statutory term to mean different things in different cases.

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[14] *Gladden v. Roach*, No. S-84-220-CA (E. D. Tex., November 7, 1991); *Garrison v. Box*, No. S-88-254-CA (E.D. Tex., October 11, 1991).

[15] The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 makes abundantly clear that "the amount of fees awarded [is to] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as anti-trust cases." S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at 6, reprinted in 1976 U. S. Code Cong. & Admin. News 5908 at 5913.

3. The Fifth Circuit's interpretation of the term "prevailing party" replaces a simple, straightforward, easily understandable statutory standard with an evanescent, fact-specific inquiry into the *degree* of success a party attains, measured only by the amount of money awarded and the court's perception of what motivated the litigation. If a § 1983 plaintiff wants a million dollars for a deprivation of federal rights, but recovers only $500.00, would the Fifth Circuit conclude that the plaintiff "prevailed" under § 1988? How about $50.00? How about $5.00? What if the plaintiff, as a matter of constitutional principle, wants no more than nominal damages?

The open-ended, essentially standardless inquiry mandated by the Fifth Circuit's decision threatens almost endless satellite litigation over an easy question that ought to be easily answerable. Congress cannot have intended such a simple issue to require another lawsuit to resolve it.

4. If a plaintiff awarded only nominal damages is not a "prevailing party" for purposes of recovering attorney's fees as "costs" under § 1988, such a plaintiff cannot have "prevailed" for purposes of taxing the costs of litigation under 28 U.S.C. § 1920 or any other federal statute. Clerical and witness fees, docket fees, deposition costs, and other expenses would be taxable as a matter of course against the plaintiff. From the Fifth Circuit's perspective, the defendant "prevailed." The plaintiffs "lost."

5. The Fifth Circuit's holding will have a devastating effect on federal litigation involving serious constitutional violations that do not inflict injuries compensable through significant monetary damages.

Substantial deprivations of federal rights will go unremedied simply because the injury to the victim is intangible. Congress did not intend that result.

No Supreme Court decision supports even by inference the Fifth Circuit's strange, stilted, unwieldy result, at variance with common sense and any literal reading of the plain, simple language of the statute. Denying *all* attorney's fees when only nominal damages are recovered in civil rights cases undermines a long-standing national commitment and substitutes the quasi-legislative and policy-making judgment of federal judges for that of Congress.

Civil rights plaintiffs recovering nominal damages, based upon a specific jury finding that federally protected civil rights have been violated, are "prevailing parties." Congress in § 1988 intended for them to be treated that way. It did not intend for an award of attorney's fees to be denied altogether "because the rights involved may be non-pecuniary in nature."[16] The Fifth Circuit's decision, relegating winners to the status of losers, presents an issue of importance to the administration of the federal civil rights laws. It has not been, but should be, settled by this Court. Supreme Court Rule 10.1(c).

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[16] S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at 6, reprinted in 1976 U. S. Code Cong. & Admin. News 5908 at 5913.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 1991

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(Filed August 2, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH DAVIS FARRAR	§	
and	§	
DALE LAWSON FARRAR	§	
	§	CA NO. 75-H-987
VS.	§	
	§	
CLARENCE D. CAIN,	§	
RUTH URMY,	§	
WILLIAM P. HOBBY, JR.,	§	
RAYMOND W. VOWELL,	§	
LONNIE A. GRUVER,	§	
and ARTHUR J.	§	
HARTELL, III	§	

ORDER SUBSTITUTING CO-ADMINISTRATORS
AS PLAINTIFFS

This matter having come on before this Court for hearing on August 2, 1983 pursuant to the Motion of Pat Smith and Dale Farrar, Co-Administrators of the Estate of Dr. Joseph D. Farrar to substitute them as Plaintiffs in the above entitled cause; and it appearing to the Court after examination of the Motion, Briefs, and pleadings filed in this cause, that the application should be granted; therefore

IT IS ORDERED that the Motion be granted and that Pat Smith and Dale Farrar as Co-Administrators of the Estate of Dr. Joseph D. Farrar, Deceased, be substituted as Plaintiffs herein in the place and stead of Dr. Joseph D. Farrar, the Plaintiff of record.

DATED: August 2, 1983

Robert B. O'Conor, Jr.
Judge Presiding

(Filed April 8, 1985)

Joseph Davis FARRAR and Dale Lawson Farrar, Plaintiffs-Appellants,

v.

Clarence D. CAIN, et al., Defendants-Appellees.

No. 84-2099
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 8, 1985.

In section 1983 action, the United States District Court for the Southern District of Texas entered summary judgment for defendants, and plaintiffs appealed. The Court of Appeals, 642 F.2d 86, vacated and remanded. On remand, the United States District Court for the Southern District of Texas, at Houston, Robert O'Conor, Jr., J., entered judgment for the defendants and plaintiffs appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) plaintiffs had opportunity to object timely to proposed instructions and special interrogatories regarding, inter alia, award of compensatory and punitive damages, issue of foreseeability, and burden of proof, but apparently did not do so, thus largely precluding review of issues raised on appeal; (2) although punitive damages may be awarded in section 1983 action even in absence of actual injury, failure to object to jury charge and special interrogatories precluded review; (3) absent finding that conspirators deprived plaintiffs of their civil rights, jury's finding that conspiracy existed did not support award of damages, nominal or

compensatory, against the conspirators; and (4) since one defendant was found to have violated plaintiff's civil rights, jury should have awarded nominal damages, not to exceed $1.

Affirmed in part, reversed in part, and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN, RANDALL, and TATE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:*

In this suit against Texas state officials under 42 U.S.C. § 1983 for violation of the plaintiffs' civil rights, the trial court entered judgment for the defendants based on a jury verdict that found at least one of the defendants liable but awarded no damages. The plaintiffs appeal contending that the trial court erroneously instructed the jury on nominal and actual damages and erroneously failed to inform the jury that it might award punitive damages in the absence of actual damages. They also contend that we should remand for a new trial on damages. Because the plaintiffs failed to object to the jury charge on compensatory and punitive damages as given and we find no fundamental error in it, and because the trial court did not abuse its discretion in denying a new trial on that ground, we affirm the denial of those damages. Because the jury found that at least one defendant had violated the plaintiffs' civil rights, we reverse the trial

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* All parties have either waived or failed to request oral argument. The case was, therefore, decided on the briefs. Local Rule 34.3 and Fifth Circuit Internal Operating Procedure — Screening.

court's denial of nominal damages as to that defendant and remand for the court's entry of nominal damages, not to exceed $1.00.

Joseph D. Farrar and Dale L. Farrar, his son, owned and operated Artesia Hall, a school in Liberty County, Texas, for the care of delinquent, handicapped, or disturbed teenage boys and girls. The defendants, all Texas state officials, obtained a grand jury indictment against Joseph Farrar for the homicide of an Artesia Hall student and a state court temporary injunction against the operation of Artesia Hall. The homicide charge was later dismissed. In their § 1983 civil rights complaint, the Farrars alleged that the defendants violated their civil rights by, among other things, taking illegal steps to close the school, thereby depriving them of the right to practice their livelihood and profession. Answering special interrogatories, the jury found that one of the plaintiffs had violated the Farrar's civil rights, but it awarded no damages.

Challenging the jury instructions, the Farrars contend that the trial court erred in not instructing the jury on nominal damages and in not awarding nominal damages as a matter of law because, in civil rights cases, nominal damages are routinely presumed or inferred. They also argue that the court erred by including in the jury instructions foreseeability as a defining characteristic of proximate cause without observing that, although foreseeability may be a proper test for determining damages for unintentional tort violations of civil rights, it is not a proper prerequisite to obtaining recompense for intentional violations. Additionally, they claim that the trial court failed to instruct the jury that, once the plaintiffs prove a

constitutional violation, the burden shifts to the defendants "to show by a preponderance of evidence that there was no 'but-for causation in fact' relation between the constitutional violation and plaintiffs' damages."[1] Finally, the Farrars assert that the court committed reversible error in the special interrogatories by predicating any award of punitive damages on the jury's having awarded actual damages and by not granting their motion for a new trial.

Fed.R.Civ.P. 51 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests .... No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The purpose of this rule is to allow the trial court to correct any error before the jury begins its deliberation.[2] In *Delancey v. Motichek Towing*

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[1] The Farrars cite *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977), in support of this position. Given their failure to object to the jury charge, we do not address the propriety of applying *Mt. Healthy* in the manner the Farrars suggest. *See infra* text accompanying notes 2-10.

[2] *See* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2553, at 634 (1971).

Service, Inc.,[3] this court stated:

> This Court has consistently held that the specifications of errors dealing with the giving of or failure to give instructions will not be considered unless the party objects in the manner provided by the rule .... The objection must be sufficiently specific to bring into focus the precise nature of the alleged error.... A general objection presents nothing for review.[4]

The Farrars were given an opportunity to object timely to the proposed instructions and the special interrogatories. The record, however, is devoid of any indication that they objected to either with respect to any of the issues on appeal.[5] Moreover, the Farrars filed a proposed jury charge that failed to limit foreseeability to unintentional torts or to request a *Mt. Healthy*[6] charge.

Failure to object to the jury charge in the trial court precludes review on appeal unless the error is so fundamental as to result in a miscarriage of justice.[7]

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[3] 427 F.2d 897 (5th Cir.1970).

[4] *Id.* at 900 (citations omitted); *see also United States v. Marbury*, 732 F.2d 390, 403 (5th Cir. 1984).

[5] Although the Farrars have not provided us with a trial transcript, the appellees have provided us with an excerpt of the transcript which shows that the Farrars' counsel lodged no objection on these grounds. The record contains the same excerpt.

[6] 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471, 483 (1977); *see supra* note 1 and accompanying text.

[7] *See Whiting v. Jackson State Univ.*, 616 F.2d 116, 126 (5th Cir.1980); *cf. Wallace v. Ener*, 521 F.2d 215, 218-219

With regard to compensatory damages, our review of the record does not indicate that such a fundamental error was committed. The Farrars bear the burden of insuring that all their objections are made part of the record.[8] The Farrars, however, stated that they "have appealed to this court without a transcript and rely upon the record and questions of law presented in their brief." Even if an objection was lodged, it does not appear in the appellate record.[9] Reviewing the record on appeal, we find neither fundamental error nor miscarriage of justice.[10]

The Farrars also contend that the trial court erred in predicating the finding of punitive damages upon a finding of actual damages. They argue that, "since the jury found that Appellees violated Appellants' civil rights, the Appellants should be allowed to have a jury consider what amount, if any, would be appropriate punitive damages to deter Appellees from future unlawful conduct or punish them for their wrongful act in violating Appellant's civil rights."

Here, too, the Farrars' failure to object to the trial judge's charge to the jury and to the special interrogatories submitted to the jury precludes our review in the absence of plain error or manifest miscarriage of justice.[11] Although punitive damages

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(5th Cir.1975).

[8] *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 127 (5th Cir.1980) (citing Fed.R.App.P. 10(b) & (c)).

[9] *See supra* note 5.

[10] *Whiting v. Jackson State Univ.*, 616 F.2d 116, 126 (5th Cir.1980).

[11] *See Whiting v. Jackson State Univ.*, 616 F.2d 116, 126-

may be awarded in a § 1983 action even in the absence of actual injury,[12] failure to object precludes review if, as here, there is no plain error or manifest miscarriage of justice.[13] The record shows that the interrogatory predicating an award of punitive damages on a finding of actual damages was brought to the attention of the court and that the Farrars' counsel agreed to the charge and advised the court that he had no objection.

The trial court did not err by failing to award nominal damages as to all of the defendants except Hobby. Interrogatory No. 3 asked the jury whether any of the defendants "engaged in a conspiracy against one or more of the plaintiffs as defined in the charge." The jury answered "yes" as to all of the defendants except defendant Hobby. Interrogatory No. 4 asked whether "such conspiracy was a proximate cause of any damages to the plaintiff." The jury answered this question by checking "no" and, therefore, awarded no damages in response to Interrogatory No. 5.

The jury did not find, therefore, that any of these defendants deprived the plaintiffs of their civil rights. As we have recently stated:

> Under § 1983 conspiracy can furnish the conceptual spring for imputing liability from one to another.... A conspiracy may also be used to furnish the

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27 (5th Cir.1980).

[12] *See Ryland v. Shapiro*, 708 F.2d 967, 976 (5th Cir.1983).

[13] *See Whiting v. Jackson State Univ.*, 616 F.2d 116, 126 (5th Cir.1980); *Abraham v. Pekarski*, 728 F.2d 167, 172 (3d Cir.), *cert. denied*, _ U.S. _, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984).

> requisite state action .... Yet, it remains necessary to prove an actual deprivation of a constitutional right; a conspiracy to deprive is insufficient.... Here [the plaintiff] has failed to show any such deprivation. Without a deprivation of a constitutional right or privilege, [the defendant] has no liability under § 1983.[14]

We are unable to read the jury charge to say, as the Farrars contend, that the jury's answers lead to the conclusion that it found the conspirators to have violated the Farrars' civil rights. Absent a finding that the conspirators deprived the Farrars of their civil rights, the jury's finding that a conspiracy existed will not support an award of any damages against the conspirators, compensatory or nominal.[15]

The findings as to Hobby were different. Interrogatory No. 7 instructed the jury that, if it had found that defendant Hobby had not conspired with the other defendants to violate the plaintiffs' civil rights, it should decide whether "Defendant Hobby committed an act ... under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right." The jury answered that Hobby had violated Farrar's civil rights, but also found, in response to Interrogatory No. 8, that his acts were not "a proximate cause of any damages" to Farrar. In response to Interrogatory No. 9, therefore, the jury awarded Farrar no damages for Hobby's acts.

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[14] *Villanueva v. McInnis*, 723 F.2d 414, 418 (5th Cir.1984).

[15] *See id.; see also Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252, 266 (1978).

Even when a violation of a civil right causes no actual injury to the plaintiff, the plaintiff is entitled to recover nominal damages.[16] We have awarded nominal damages, not to exceed one dollar, when an infringement of a fundamental right was shown[17] and we have also held that, once a jury has found a violation of a plaintiff's civil rights, it "could not ignore that finding in calculating damages. Violation of [the plaintiff's] constitutional rights was, at a minimum, worth nominal damages."[18] Because the jury explicitly found that defendant Hobby had violated Farrar's civil rights, the jury should have awarded Farrar nominal damages, not to exceed one dollar, and it was error for the trial court not to do so when the Farrars so moved in their motion for a new trial.

The Farrars also complain that the court erred in denying a motion for new trial because of its failure to instruct the jury properly on the issues of damages and causation. In this circuit, appellate review of the trial court's denial of a new trial is severely limited, and we will interfere only when the trial court has abused its discretion or failed properly to exercise it.[19] In considering a motion for a new trial, the trial judge is

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[16] *Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252, 266 (1978).

[17] *See, e.g., Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir.1980) (violation of first amendment rights).

[18] *Webster v. City of Houston*, 689 F.2d 1220, 1230 (5th Cir.1982), *vacated and remanded on other grounds*, 735 F.2d 838 (5th Cir.), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th Cir. 1984) (en banc rehearing granted).

[19] *See United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976, 990 (5th Cir.1984).

free to weigh the evidence,[20] and we will not find that the district court abused its discretion "unless there [was] an 'absolute absence' of evidence to support the jury's verdict."[21] Because the Farrars have chosen not to submit a transcript of the trial to us, we cannot determine whether there is an "absolute absence" of evidence to support the verdict of the jury and, therefore, cannot say that the trial court committed any abuse of discretion.

The Farrars also ask us to sever the damages issues and grant a new trial simply to determine the amount of damages because the interrogatories and the instructions submitted to the jury were erroneous as a matter of law. Although this court may, in a proper case, sever the damages issues,[22] we find no reason to do so in this case. As we have previously noted, the Farrars failed to object to the jury instructions or the special interrogatories on damages. Because we can neither review nor find error as to damages, other than nominal damages, it would be improper for us to sever and to remand the damages issues for a new trial.

For these reasons, the judgment is AFFIRMED IN PART, REVERSED IN PART, and REMANDED for proceedings consistent with this opinion.

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[20] *Id.*

[21] *Id.*

[22] *See Hadra v. Herman Blum Consulting Eng'rs*, 632 F.2d 1242, 1245-46 (5th Cir.1980), *cert. denied*, 451 U.S. 912, 101 S.Ct. 1983, 68 L.Ed.2d 301 (1981); *see also Eximco, Inc. v. Trane Co.*, 748 F.2d 287, 290 (5th Cir.1984).

(Filed January 30, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

The Estate of JOSEPH D. FARRAR and DALE LAWSON FARRAR, Plaintiffs, *versus* CLARENCE D. CAIN, RUTH URMY, WILLIAM P. HOBBY, JR., RAYMOND W. VOWELL, LONNIE A. GRUVER, and ARTHUR J. HARTELL, III, Defendants.	§	CIVIL ACTION No. H-75-987

ORDER ON ATTORNEY'S FEES

Pat Smith, Dale Farrar, and Dale Lawson Farrar are awarded attorney's fees of $280,000.00, expenses of $27,932.00, and $9,730.00 of prejudgment interest on the expenses (at 9% after September 1983) as additional costs of court against William P. Hobby, Jr., plus interest at 5.75% per annum from January 23, 1987; Pat Smith, Dale Farrar, and Dale Lawson Farrar recover nothing of Clarence D. Cain, and Arthur J. Hartell, Jr.

Signed on January 30, 1987, at Houston, Texas.

Lynn N. Hughes
United States District Judge

(Filed August 31, 1990)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

The Estate of JOSEPH D. FARRAR and DALE LAWSON FARRAR, Plaintiffs, *versus* CLARENCE D. CAIN, RUTH URMY, WILLIAM P. HOBBY, JR., RAYMOND W. VOWELL, LONNIE A. GRUVER, and ARTHUR J. HARTELL, III, Defendants.	§	CIVIL ACTION No. H-75-987

MEMORANDUM ON ATTORNEYS' FEES

Dale Farrar has applied for allowance of attorneys' fees and expenses incurred in the prosecution of a civil rights suit against Clarence D. Cain, Ruth Urmy, William P. Hobby, Jr., Raymond W. Vowell, Lonnie A. Gruver, and Arthur J. Hartell, III. A six-week jury trial resulted in a finding that only Hobby had deprived the Farrars of their civil rights. Nominal damages were awarded after an appeal.

The court, after an evidentiary hearing, granted Farrar's petition for $280,000 of attorneys' fees. On the defendant's motion, a rehearing was held.

Lieutenant Governor Hobby, through the Attorney General, presented seven hours of evidence and hundreds of pages of briefing but has not rebutted the Farrars' original showing that they prevailed at trial and on appeal or that the award of $280,000 was unreasonable. The motion to reconsider will be denied. These findings are supplemental to those in the record.

Facts.

The Farrars sued a Liberty County attorney, a Texas district judge, two public welfare department officials, and Lieutenant Governor Hobby for civil rights violations, claiming that their actions resulted in the destruction of Dr. Farrar and his son's reputations and the permanent closure of their school, Artesia Hall. The defendants collectively closed Artesia Hall, a home for juvenile delinquents, in an *ex parte* proceeding. On June 22, 1973, after a highly-publicized inspection of the school, Hobby demanded the closing of Artesia Hall. Although Dale Farrar was located in a jail cell adjoining the Liberty County court house and could have been summoned, the Hall was closed in a 20-minute *ex parte* hearing at which Hobby was present.

The jury found that the defendants were not entitled to qualified immunity because they had acted outside the scope of their official responsibilities. The Farrars showed that indictments against them were obtained by holding over a grand jury on which a member of the Liberty County Department of Public Welfare deliberated and by supplying fabricated evidence to the grand jury. Also, they argued that Artesia Hall was closed on the pretense that the plaintiffs had not obtained a license from the Department of Public Welfare. The defendants who closed the school had,

however, conspired to make compliance with the licensing requirements impossible for Artesia Hall. Apparently, the defendants were embroiled to such a degree in pursuit of a politically popular campaign against child abuse that they deprived the target of their campaign of important procedural due process rights, which, until the outcome of this suit, resulted in the professional ruin of the Farrars.

Although Dale Farrar was awarded only nominal monetary damages, he represents that the suit satisfied his main objective of clearing his and his father's reputation by showing that the defendants had abused their public positions when they arrested Joseph Farrar for murder and attempted to prosecute both him and his father without cause.

Background.

The Farrars' suit was filed in 1975, but soon it was dismissed by the district court. The court of appeals vacated and remanded the case. Attorneys' fees for both parties escalated to exorbitant levels in part because the case was twice appealed, took 10 years to resolve, and required a six-week trial, which was complicated by the death of Joseph Farrar, a plaintiff, and the plaintiffs' chief witness. Doctor Farrar died just before trial in April 1983, necessitating the gathering of additional evidence.

It is perhaps because of Farrar's untimely death that large actual monetary damages were not proved and a take nothing judgment was entered. The jury instructions made it difficult to discern exactly what the jury found, but at least all of the defendants, with the exception of Hobby, were found to have conspired

against the Farrars. The plaintiffs appealed the judgment, and the court of appeals reversed the trial court's entry of a take nothing judgment against Hobby and remanded the case for the entry of nominal damages. *Farrar v. Cain,* 756 F.2d 1148 (5th Cir. 1985). The district court ordered that each party bear its own costs even though the jury found that Hobby had violated the Farrars' civil rights; this ruling was also reversed. An interim application for attorneys' fees had been filed by the Farrars in October 1984 and was amended in 1985 and 1987.

Preclusion.

Hobby argues that this proceeding is precluded by the trial court's original ruling at the trial. Although Hobby never appealed the verdict that he had violated the Farrars' civil rights, he maintains that he did nothing wrong, and, had he known he would have been liable for attorneys' fees, he would have appealed. Hobby also argues that since the plaintiffs appealed the court's order and appeared "down cast" when the verdict was delivered, they perceived themselves as the losing party.

Hobby's argument that this litigation is precluded by the trial judge's order on November 10, 1983, that each party bear its own costs fails. After the November 1983 order the plaintiffs filed an application for reimbursement. The court, in a February 1985 opinion, stated that because "the element of success is partially complete"—a decision on attorneys' fees was "premature" then, but it could be reurged after the outcome of the appeal. By reversing the district court's holding on damages, the court of appeals vacated any apparent ruling on attorneys' fees.

The entry of nominal damages supports a finding that the plaintiffs prevailed at trial.

42 U.S. C. § 1988.

The statute provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." In enacting § 1988 Congress decided that the public as a whole has an interest in the vindication of the rights conferred by the civil rights statutes. Rather then placing the sole task of enforcing these rights on a government agency, it was decided that they would be more vigorously enforced if plaintiffs were compensated for their costs in successful suits.

It is undisputed that one does not have to achieve a complete and unblemished victory after a trial on the merits to be a prevailing party. This would discourage plaintiffs from bringing related claims that they might lose on and thus not receive fees for winning on a major issues. Problems arise, however, in determining who the prevailing party is when the plaintiff does not achieve all the relief requested in his suit. The legislative history of § 1988 does not provide a definite answer on the proper standard for setting a fee award where the plaintiff has not succeeded on all claims asserted. The Supreme Court has placed a great deal of discretion in the hands of the trial court. "A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness." *Blum v. Stenson*, 465 U.S. 886, 902, 104 S. Ct. 1541, 1550 n. 19 (1984).

Last term the United States Supreme Court, unanimously put to rest the central issue test previously

endorsed by the fifth and the eleventh circuits and stated what the district court must look for when seeking the prevailing party. *Texas State Teachers Assoc. v. Garland Independent School Dist.*, _ U.S. _, 109 S. Ct. 1486 (1989).

> If the plaintiff has succeeded on "any significant issue in the litigation which achieve[d] some of the benefit the parties sought in bringing suit" the plaintiff has crossed the threshold to a fee award of some kind. . . . at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. . . . Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not the availability of a fee award *vel non*.

Garland, U.S. at ___, 109 S. Ct. at 1493 *(quoting Nadeau v. Helgemoe*, 581 F. 2d 275, 278-79 (1st Cir. 1978)); *see Shipes v. Trinity Industries, Inc.*, 883 F.2d 339, 343 (5th Cir. 1989); *Rendon v. AT&T Technologies*, 883 F.2d 388, 399 (5th Cir. 1989).

Applying this new standard to this case, Farrar is entitled to a fee award. A constitutional violation by a public official is no less repugnant to our system simply because the injury is not redressable by money damages. This case is not, as Hobby asserts, a *"de minimis* technical victory." The importance of Farrar's vindication punctuates the triumph of our American spirit and a "violation of constitutional rights is never

de minimis, a phrase meaning so small or trifling that the law takes no account of it." *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988).

Nominal Damages.

The award of nominal damages meets the test announced in *Garland.*

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, . . . we believe that the denial of due process should be actionable for nominal damages without proof of actual injury. . . . By making the deprivations of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.

Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, 1054 (1978).

Even under the arguably less generous central issue test the fifth circuit has held "an attorneys' fees award may be supported by an award of nominal damages since the successful claim serves to vindicate constitutional rights." *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *McNamara v. Moody*, 606 F.2d 621 (5th Cir.1979); *cert. denied*, 447 U.S. 929, 100 S. Ct. 3028 (1980); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). In *Familias Unidas*, the fifth circuit reversed the district court and used the central issue test to award attorneys' fees. The

facts closely mirror the facts in the instant case and even the higher hurdle of the central issue test allowed an award of attorneys' fees in a case where actual damages are sought but only nominal damages are awarded. The plaintiffs in *Familias Unidas* challenged § 4.28 of the Texas Education Code. The fifth circuit twice reversed the district court's dismissal and rendered the challenged statute unconstitutional awarding the plaintiffs nominal damages.

> Though Familias and Torrez have each been less than completely successful — Familias having been refused injunctive relief by the prior panel, 544 F.2d at 186-188, and Torrez having been refused actual damages here — both prevailed with respect to the central issue of the case, the constitutionality of section 4.28. *Iranian Students Association v. Edwards,* 604 F.2d 352, 353 (5th Cir. 1979) (proper focus is whether plaintiff is successful on central issue). The granting of declaratory relief and nominal damages, based on our having found section 4.28 to be unconstitutional, adequately justifies an award of attorney's fees to plaintiffs as prevailing parties under the statute.

Id. at 405-06. Even though the plaintiffs were awarded only nominal damages the fifth circuit remanded the case for an award of attorneys' fees for the entire case. "[w]e remand to the district court solely for receipt and evaluation of plaintiff's affidavits and determination of an award of reasonable fees and costs for the entirety of this litigation, including those incurred on this remand." *Id.* at 407.

Other circuits, previous to *Garland,* have also found an award of nominal damages can support an award of attorneys' fees. *Bilbrey v. Brown,* 738 F.2d 1462, 1472 (9th Cir. 1984); *Scofield v. City of Hillsborough,* 862 F.2d 759, 766 (9th Cir. 1988); *Coleman v. Turner,* 838 F.2d 1004 (8th Cir. 1988) (reversing district courts denial of attorney's fees where nominal damages awarded); *Smith v. Debartoli,* 769 F.2d 451 (7th Cir. 1985), *cert. denied,* 475 U.S. 1067, 106 S. Ct. 1380 (1986) (holding it was in the discretion of the district court to allow attorney's fees in case where nominal damage is awarded, but fees were not awarded because the plaintiff was not an attorney). The fourth circuit has found that no award of damages, nominal or otherwise, is a prerequisite to an award of attorney's fees.

> [A] finding of liability on a § 1983 claim need not be supported by a monetary damage award for the prevailing party to reap the legal benefits of having won on the merits. A plaintiff in a § 1983 action may recover attorneys' fees under 42 U.S.C. 1988 and costs under rule 54 of the Federal Rules of Civil Procedure as long as he or she is designated the prevailing party. A monetary damage award or equitable relief is not required before a plaintiff or a defendant in a § 1983 suit may be treated as the prevailing party for the purpose of awarding costs and attorney's fees. . . . An award of $1.00 in damages in this case is not necessary in order for Ganey to be labeled the prevailing party.

Ganey v. Edwards, 759 F.2d 337, 339-40 (4th Cir.

1985). (Plaintiff won the verdict after a five-day trial but was awarded no damages and lost an appeal for nominal damages and equitable relief).

The most generous formulation comes from the third circuit and the case of *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 689 F.2d 1161 (3rd Cir. 1982), *cert. denied*, 460 U.S. 1052, 103 S. Ct. 1499 (1983). The court in *Wilmington* allowed the award of attorneys' fees in a case where the plaintiff lost the case, but a court ordered HEW investigation during the course of the litigation effectuated some of the plaintiffs goals. To come to this conclusion, allowing extra-lawsuit victory to ameliorate litigation defeat, the court enunciated the following standard: "It is settled law in this circuit that as long as a plaintiff achieves some of the benefits sought in *initiating* a lawsuit, even though the plaintiff does not ultimately succeed in securing a favorable judgment, the plaintiff can be considered the prevailing party for purposes of a fee award." *Id.* at 1166 (emphasis supplied); *See Bagby v. Beal*, 606 F.2d 411 (3rd Cir. 1979). A thorough discussion of this question can be found in *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897 (3rd Cir. 1985), which reaffirmed the lenient rule: "a plaintiff may be a prevailing party even though judgment was actually awarded in favor of the defendant." *Id.* at 912.

Means and Ends.

Requesting monetary damages in a civil rights suit is a means to an end; that the substantial damages that are requested are not ultimately awarded does not mean that important constitutional rights have not been vindicated. "It is not necessarily significant that a

prevailing plaintiff did not receive all the relief requested." *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 1941 n.11 (1983). Undoubtedly, failure to obtain monetary damages was a disappointment to Farrar, and that may explain his attorney's look of disappointment when the verdict was rendered, but this was not the sole objective or the underlying reason for the suit. The facial expression of counsel has never been held to be a criterion of who prevailed. Hobby cannot belittle the important victory secured by Dale Farrar of clearing his family name.

Hobby's characterization of himself as the victor because the jury did not find him financially liable is misplaced. Civil rights claims are among the hardest lawsuits to bring; most are dismissed by the courts before trial, as was this case initially. Obtaining the stance of "prevailing party" is measured differently in civil rights suits than in personal injury or other types of cases and is not synonymous with a money judgment. Including in their case a demand for huge money damages should not overshadow equally important results secured for both the plaintiffs and the public since it is successful litigants like the Farrars who discourage state officials from overstepping the bounds of responsibility entrusted to them. Awarding attorneys' fees when a plaintiff has shown the deprivation of liberty and property without due process, as the Farrars have done, encourages state actors to examine the legality of their actions. Unless § 1988 is construed in the manner described in *City [of] Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686 (1986), officials will not be constrained to act in consonance with the Constitution when the monetary award is likely to be small.

Although abrupt policy changes are not likely to follow as a result of this order, the cumulative effect of meritorious civil rights litigation eventually deters impermissible conduct by governmental officers and the expenditure of thousands of taxpayer dollars stubbornly to defend that misconduct. An award of reasonable attorneys' fees encourages competent attorneys to accept cases of plaintiffs who have been seriously wronged and makes the judgment fully compensatory.

Litigation over attorneys' fees alone in the Farrars' suit has spanned two years, consumed hours of oral argument, generated over 400 pages of briefs, prompted Hobby to hire a former federal judge for counsel, and caused the state to buy a 400-page transcript of the trial, all in an effort to show that the plaintiffs' significant relief did not rise to the level of "prevailing on the central issue." In short, the local case law has resulted in what *Hensley* directs should not happen: the request for attorney's fees turns into a second major litigation.

Reasonable Fees.

After determining whether the plaintiff was the prevailing party, the fee requested must be reasonable. The litigation at issue has spanned ten years. The lead trial attorney for the plaintiff spent almost 1,000 hours preparing this case for trial, and by 1987, over 2,000 hours. Hobby has submitted some records of their legal expenses defending the suit. Their total reported expenses for just five years, from January 1983 to August 1985, came to $151,954. "The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *City of Riverside,* 477 U.S. 561,

580, 106 S. Ct. 2686, 2697, n. 11 (1986) *(quoting, Copeland v. Marshall,* 641 F.2d 880, 904 (D.C. Cir. *1980)(en banc)).* A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the other litigation as a whole, or more accurately, the fee in that event is limited to the charges attributable to that issue. The Farrars' suit was not as much a case about money — although this issue was inextricably entwined with the substantive claims — as it was about the legality of the actions of six state officials. Hobby argues that even if the Farrars prevailed, their fee should be reduced because the jury found only one defendant had violated their rights and no damages were secured. The Supreme Court has rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." *Hensley,* 461 U.S. at 435, 103 S. Ct. at 1940, n. 11. Dividing the successful issue by the original number of defendants or claims reflects no reality of compensation or litigation.

In passing the Act, the legislative history indicates that Congress approved the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974) as guidelines for determining the amount of fees to be awarded. These factors are: (1) the time and labor required, (2) novelty and difficulty of the questions, (3) level of skill requisite to perform the legal service properly, (4) preclusion of other employment by the attorney's acceptance of the case, (5) customary fee, (6) type of fee arrangement, either fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) amount involved and the results obtained, (9) experience, reputation, and ability of the attorneys, (10) undesirability of the case,

(11) nature and length of the professional relationship with the client, and (12) amount of awards in similar cases.

The time spent is undisputed. (1)

Application.

On the second of the *Georgia Highway Express* factors, the novelty and difficulty of the case, it is clear that it was a difficult case in a changing area of the law that has always been difficult. (2)

The skill required was serious, and that it precluded other work is clear. (3, 4).

The customary fee is consistent with the application, so that is a neutral factor. (5)

Whether it is fixed or contingent shifted from time to time, but that is considered a positive factor in the application simply because of the necessity that they advanced considerable cost, recovery of which was always contingent and riskily so. (6)

The time constraints were normal. (7) Time constraints in litigation are always harrowing, but there were none in this case that made it extraordinarily difficult, so that is a neutral factor.

The amount involved and results obtained factor was divide into two. The amount involved, the $17 million, has been disregarded except as lawyer hyperbole. How much was involved is unknown and will be treated as a negative factor because the amount involved turned out not to be critical. (8a)

The second half, results obtained, the results obtained are significant, but possibly less clearly than

the Farrars wanted. That will be treated as a neutral factor. The finding of vindication is significant and especially to people who must continue to live and do business in a mostly rural Texas county. (8b)

The standing of counsel is a positive factor. There is no dispute. Waggoner Carr has been Speaker of the Texas House of Representatives, Attorney General of Texas, and is a distinguished trial lawyer. (9)

The disposition of the case is a positive factor. The nature of the case is a negative factor. The attorney and client had a casual relation at the beginning. (11) Similar awards is a neutral factor. (12)

Despite the fact that there are six positive, two negative, and four neutral factors the award will not be increased.

Carr's hourly rates are entirely reasonable. The plaintiffs will be awarded $280,000 attorney's fees and $27,932 costs.

At the original fee hearing, the Farrars called the trial judge (who has returned to private practice since the trial) as their expert witness. Based on his experiences both as a trial lawyer and federal judge, Mr. Robert O'Conor is well qualified to testify about the process of calculating an appropriate fee in a civil rights case; however, none of this testimony was employed by the court to impeach the record of the preappeal proceedings. The result has not been affected by the appearance of two distinguished former members of this court, neither Robert O'Conor as a witness for the plaintiffs nor Finis Cowan as local counsel for the defendant. Prior public service is not a disqualification.

When large attorney's fees are awarded following a small award for actual damages, detractors of civil rights litigation predictably scream "windfall." There is no windfall. Every cent of the attorney's fee was earned by intelligent, difficult work by the lawyers. That they should be paid is no more a windfall than the assistant attorney general's salary was a windfall to him. He lost the case and still had his fee paid by the public.

The government grows more complicated, more powerful, more pervasive. The constitutional decision made after the Civil War to leave the vindication of all of our rights up to individual litigants is more important now than it was then, and that the plaintiffs can trace no revolution in public administration by reason of this case does not diminish the contribution that is made by people who force public officials to comply with the law. It is not just the family name of the Farrars and the protection of the Farrars from an excessive government that has been accomplished here. The protection extends to all Americans.

It is unfortunate that this system of civil justice has taken fifteen years to resolve this matter. There will be prejudgment interest on the fee and cost award based on the federal postjudgment rate since the oral rendition of this award.

This motion to reconsider will be denied.

Signed on August 22, 1990, at Houston, Texas.

Lynn N. Hughes
United States District Judge

(Filed August 31. 1990)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

The Estate of JOSEPH D. FARRAR and DALE LAWSON FARRAR, Plaintiffs, *versus* CLARENCE D. CAIN, RUTH URMY, WILLIAM P. HOBBY, JR., RAYMOND W. VOWELL, LONNIE A. GRUVER, and ARTHUR J. HARTELL, III, Defendants.	§	CIVIL ACTION No. H-75-987

ORDER DENYING RECONSIDERATION OF ATTORNEYS' FEES

The defendants' motion for reconsideration of the award of attorneys' fees is denied.

Signed on August 22, 1990, at Houston, Texas.

Lynn N. Hughes
United States District Judge

(Filed September 17, 1991)

ESTATE OF Joseph D. FARRAR
and Dale Lawson Farrar,
Plaintiffs-Appellees,

v.

Clarence D. CAIN, et al., Defendants,

and

William P. Hobby, Jr., Defendant-
Appellant.

No. 90-2830.

United States Court of Appeals,
Fifth Circuit.

Sept. 17, 1991.

In § 1983 action, the United States District Court for the Southern District of Texas entered summary judgment for defendants, and plaintiffs appealed. The Court of Appeals, 642 F.2d 86, vacated and remanded. On remand, the District Court, Robert O'Conor, Jr., J., entered judgment for defendants and plaintiffs appealed. The Court of Appeals, 756 F.2d 1148, affirmed in part, reversed in part, and remanded. Plaintiffs subsequently filed application for attorney's fees. The District Court, Lynn N. Hughes, J., entered order awarding plaintiffs attorney's fees, and defendants appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that plaintiffs were not "prevailing parties" under statute allowing for award of attorney's fees to prevailing parties.

Reversed.

Reavley, Circuit Judge, dissented with opinion.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, HIGGINBOTHAM and DUHE, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Joseph and Dale Farrar brought a § 1983 suit against then-Lieutenant Governor William Hobby, among others, alleging that Hobby had participated in a conspiracy to deprive the Farrars of their civil rights. At trial the Farrars sought only money--$17 million in damages. The jury found Hobby innocent of any conspiracy, but nonetheless found that he had violated the Farrars' civil rights. Yet the jury found no damages. On remand, the trial court awarded the Farrars $1 in nominal damages and, finding the Farrars to be the "prevailing parties" under § 1988, awarded them over $300,000 in attorney's fees and expenses. We are not persuaded that the Farrars were the prevailing parties under § 1988. We reverse the fee award.

I

Joseph and Dale Farrar at one time operated Artesia Hall, a facility for troubled teens, in Liberty County, Texas. After the death of an Artesia Hall student in 1973, a Liberty County grand jury returned a murder indictment against Joseph Farrar. The indictment charged Farrar with willfully failing to administer proper medical treatment to the student and failing to timely provide for her hospitalization. Shortly thereafter, the state of Texas, acting through its

Attorney General, obtained a temporary injunction closing Artesia Hall.

William Hobby, then Lieutenant Governor, played some role in the events leading to the closing of Artesia Hall. Upon learning of the indictment through the media, and discussing the situation with State Representative John Whitmire, Hobby issued a press release criticizing the Texas Department of Public Welfare and its licensing procedures. He also contacted Raymond Vowell, the director of the TDPW, and urged him to investigate Artesia Hall. Several days later, Hobby met with Governor Dolph Briscoe and accompanied Briscoe on an inspection of Artesia Hall. Finally, he attended the temporary injunction hearing with Briscoe, but did not personally testify, and spoke to reporters after the hearing.

The murder indictment was eventually dismissed. Joseph Farrar later filed this suit against Hobby, Judge Cain, County Attorney Hartel, and the director and two employees of the Texas Department of Public Welfare, seeking injunctive relief and monetary damages under 42 U.S.C. §§ 1983 and 1985. Later amendments to the complaint added Farrar's son, Dale, as a plaintiff, dropped the claim for injunctive relief, and increased the requested damages to $17 million. The Farrars alleged that the defendants violated their civil rights by, among other things, malicious prosecution aimed at closing the school, thereby depriving them of the right to practice their livelihood and profession. They also alleged a conspiracy to violate their civil rights.

The district court granted the defendants' motion for summary judgment on February 23, 1981, but a panel of this court vacated the order. Joseph Farrar

died on February 20, 1983, and the court granted a motion to substitute the co-administrators of his estate, Pat Smith and Dale Farrar, as plaintiffs. On August 15, 1983, the case was tried to a jury on ten special interrogatories. The jury found that none of the defendants were immune from liability, that all of the defendants except Hobby, engaged in a conspiracy against the plaintiffs, that the conspiracy was not the proximate cause of any injury, that Hobby "committed an act or acts under color of state law that deprived Plaintiff Joseph Farrar of a civil right," and that Hobby's acts were not the proximate cause of any injury. The district court entered judgment in accordance with the jury's findings on November 10, 1983.

On appeal, in an opinion dated April 8, 1985, this court affirmed in part and reversed in part. We affirmed the district court's failure to award nominal damages against the defendants engaged in the conspiracy because, to establish liability under § 1983, "it remains necessary to prove an actual deprivation of a constitutional right; a conspiracy to deprive is insufficient."[1] However, because the jury found that Hobby committed a civil-rights violation, we remanded for the entry of nominal damages against him.[2]

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[1] *Farrar v. Cain*, 756 F.2d 1148, 1151 (5th Cir. 1985) (quoting *Villanueva v. McInnis*, 723 F.2d 414, 418 (5th Cir.1984)).

[2] *Id.* at 1152 (citing *Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978); and *Webster v. City of Houston*, 689 F.2d 1220, 1230 (5th Cir.1982), *vacated and remanded on other grounds*, 735 F.2d 838 (5th Cir.), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th Cir.1984) (en banc rehearing granted)).

The Farrars subsequently filed an application for attorney's fees under 42 U.S.C. §§ 1988, seeking to recover $248,362.50 in fees and $27,976.74 in expenses. After a hearing, the district court entered an order awarding "Pat Smith, Dale Farrar, and Dale Lawson Farrar" $280,000.00 in fees, $27,932.00 in expenses, and prejudgment interest, against Hobby only. The court denied reconsideration of the fee award, and Hobby now appeals to this court. We hold that the Farrars are not "prevailing parties" under § 1988 and therefore reverse.

II

Section 1988 provides, in relevant part, as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs.[3]

In several recent cases, the Supreme Court has articulated standards for determining whether a party has prevailed for purposes of recovering attorney's fees under § 1988.[4] In *Garland*, rejecting the "central

[3] 42 U.S.C.A. § 1988 (West 1981) (emphasis added).

[4] *Texas State Teachers v. Garland Indep. School Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988); *Hewitt v. Helms*, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

issue" test, which this circuit had applied,[5] the Court stated that "[i]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind."[6] The Court went on to say that,

> at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. Beyond this absolute limitation, a technical victory may be so insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status.[7]

The Court also noted that it had first laid this "floor" prevailing-party requirement in *Hewitt*.

Hewitt was an inmate's § 1983 suit against prison officials. Following a prison riot in Pennsylvania, officials "charged" inmate Aaron Helms for allegedly striking an officer. Relying solely on the hearsay testimony of the charging officer, a prison committee found Helms guilty. Helms sued claiming denial of due process. The prison officials contested the

[5] *Texas State Teachers Assoc. v. Garland Indep. School Dist.*, 837 F.2d 190 (5th Cir.1988), *rev'd*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989).

[6] *Garland*, 109 S.Ct. at 1493 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)). In *Hensley v. Eckerhart*, 103 S.Ct. at 1939 (1983), the Court applied the same standard.

[7] *Id.* (citations omitted).

constitutional claim and invoked qualified immunity. The district court granted summary judgment for the defendants but did not decide the immunity issue. However, the Third Circuit, finding that Helms was denied due process, reversed and instructed the trial court to enter summary judgment for Helms unless the officials could establish an immunity defense. On remand the district court granted summary judgment for the defendants on the basis of qualified immunity.

The Supreme Court held that Helms was not a prevailing party:

> Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail .... Helms obtained no relief. Because of the defendants' official immunity he received no damages award. No injunction or declaratory judgment was entered in his favor.[8]

The Court then made the following distinction between "a vindication of rights" and "some relief on the merits:"

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces--the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant.... The real value of the judicial pronouncement--what makes it a proper

[8] *Hewitt*, 107 S.Ct. at 2675.

> resolution of a "case or controversy" rather than an advisory opinion--is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff* .... As a consequence of the present lawsuit, Helms obtained nothing from the defendants. The only "relief" he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated. The same moral satisfaction presumably results from any favorable statement of law in an otherwise unfavorable opinion.[9]

The Court applied the *Hewitt* principles in *Rhodes v. Stewart.*[10] In *Rhodes* two inmates in an Ohio prison filed a § 1983 complaint, alleging that, by refusing to permit the inmates to subscribe to a magazine, prison officials had violated the inmates' First and Fourteenth Amendment rights. The district court eventually decided in favor of the plaintiffs, ruling that the officials had not applied the proper procedures and standards. But by the time the district court issued its decision, one of the inmates had died and the other had been released. The district court awarded attorney's fees to the plaintiffs. The court of appeals construed the district court's decision as a declaratory judgment and therefore upheld the fee award.

The Supreme Court reversed the fee award on the ground that, because the plaintiffs had won no relief from the defendants, *Hewitt* was controlling:

[9] *Id.* 107 S.Ct. at 2676 (emphasis in original).

[10] 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988).

> A declaratory judgment ... is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant towards the plaintiff. In this case there was no such result. A modification of prison policies on magazine subscriptions could not in any way have benefited either plaintiff, one of whom was dead and the other released before the District Court entered its order.... The case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever. In the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence is not entitled to an award of attorney's fees.[11]

Thus, after *Hewitt, Rhodes,* and *Garland,* to qualify as a prevailing party, a plaintiff must show that he won at least some relief from the defendant, that the outcome of the suit changed the legal relationship between the parties, and that the plaintiff's success was not a *de minimis* or technical victory.

III

We are persuaded that the Farrars were *not* prevailing parties for the purposes of § 1988, and we therefore reverse. The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. "That is not the stuff of which legal

[11] *Rhodes,* 109 S.Ct. at 203-04.

victories are made."[12] Of course, as the district court emphasized, the Farrars did succeed in securing a jury-finding that Hobby violated their civil rights and a nominal award of one dollar. However, this finding did not in any meaningful sense "change the legal relationship" between the Farrars and Hobby.[13] Nor was the result a success for the Farrars on a "significant issue that achieve[d] some of the benefit the [Farrars] sought in bringing suit."[14] When the sole relief sought is money damages, we fail to see how a party "prevails" by winning one dollar out of the $17 million requested. Furthermore, even if the Farrars could be seen as victors, given their singular objective of money damages, surely theirs was "a technical victory... so insignificant, and ... so near the situations addressed in *Hewitt* and *Rhodes,* as to be insufficient to support prevailing party status."[15]

In *Hewitt* the plaintiff secured a judicial determination that his constitutional rights had been violated. But since he was unable to get any form of relief from the defendants--owing to the defendants' governmental immunity--the plaintiff was deemed not to be a prevailing party. The same principle was applied in *Rhodes.* There the Court said that, although the plaintiffs won a declaratory judgment stating that the defendants had violated constitutional rights, the plaintiffs were not prevailing parties under § 1988

[12] *Hewitt,* 107 S.Ct. at 2676.

[13] *Garland,* 109 S.Ct. at 1493.

[14] *Id.*

[15] *Id.*

because they received no benefit from the judgment. "In the absence of relief a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence is not entitled to an award of attorney's fees."[16] Likewise, the Farrars failed to meet that § 1988 threshold, because they too failed to win relief.

We do not diminish the significance of a finding of a constitutional violation. In *Carey v. Piphus*,[17] stressing "the importance to organized society that procedural due process be observed," the Supreme Court held that the denial of due process is actionable for nominal damages even without proof of actual injury.[18] Moreover, as the district court noted, we have held that "[a] violation of constitutional rights is never *de minimis*," in the sense that a constitutional violation is never "so small or trifling that the law takes no account of it."[19] That holding is no less valid today. Rather, we hold that when the sole object of a suit is to recover money damages, the recovery of one dollar is no victory under § 1988. This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more. We

[16] *Rhodes*, 109 S.Ct. at 204.

[17] 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978).

[18] Although the Court spoke to the issue indirectly, *Carey*, 435 U.S. at 257 n. 11, 98 S.Ct. at 1049 n. 11, it did not answer the question whether a plaintiff who wins only nominal damages may recover attorney's fees.

[19] *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988) (citing *Carey*).

must--under *Garland*,[20] *Hewitt*, and *Rhodes*--inquire into whether the plaintiff's victory, as measured by the relief actually obtained, was merely a *de minimis* or technical success.[21]

Our holding today conflicts with opinions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.[22] The most recent of those opinions, and the one whose reasoning and holding are most obviously contrary to our own, is *Ruggiero v. Krzeminski*.[23]

In *Ruggiero*, police officers conducted a search of

[20] *Garland*, 109 S.Ct. at 1493 ("Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied.") (citation omitted).

[21] In a related argument, the district court cites three Fifth Circuit opinions that supposedly stand for the proposition that the award of nominal damages will alone support a § 1988 attorney's-fee award. *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir.1982); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir.1980); *McNamara v. Moody*, 606 F.2d 621 (5th Cir. 1979). All three cases, however, were decided before and therefore were not governed by the Supreme Court's decisions in *Hewitt*, *Rhodes*, and *Garland*.

[22] *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir.1991), *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir. 1988); *Coleman v. Turner*, 838 F.2d 1004, 1005 (8th Cir.1988); *Nephew v. City of Aurora*, 830 F.2d 1547, 1553 n. 2 (10th Cir. 1987) (en banc); *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir.1987). *But see Spencer v. General Electric Co.*, 894 F.2d 651 (4th Cir. 1990) *(dicta)*. We do not lightly create a conflict. This opinion was circulated to the entire court as required by the court's policy. No member of the court has requested en banc consideration.

[23] 928 F.2d 558 (2d Cir.1991).

the Ruggieros' home and seized certain items. The Ruggieros brought § 1983 suit against the officers, alleging, among other things, that the search and the seizure were illegal. The jury found that the Ruggieros had not consented to the search. It also found, however, that the Ruggieros suffered no compensatory damages as a result of the illegal search. The trial judge directed the award of nominal damages in the amount of one dollar. The judge also determined that the Ruggieros were the prevailing parties under § 1988 and, accordingly, awarded them attorney's fees.

On appeal the Second Circuit, citing the Supreme Court's opinion in *Carey* as well as this court's opinion in *Farrar I*, approved the nominal-damage award. The court also affirmed the attorney's-fee award and rejected Officer Krzeminski's argument that the Ruggieros were not prevailing parties within the meaning of § 1988 because of their limited success at trial. Quoting from *Garland*, the court held that the Ruggieros were indeed prevailing parties:

> In a case such as the case at bar, where the claims arise out of a common core of facts and involve related legal theories, success may be assessed by examining whether plaintiffs can "point to a resolution of the dispute which changes the legal relationship between [them] and the defendant[s]."
>
> Based on the Supreme Court's "generous formulation," we think it clear that the Ruggieros were "prevailing parties" as required by section 1988. The jury's determination that appellants' fourth and fourteenth amendment rights were violated by the search conducted by the Officers assuredly is significant. Simply because the jury found that the Ruggieros did not establish their claims in all respects does nothing to lessen the significance, or importance, of the Ruggieros' success. *Although no compensatory damages were awarded, the jury's determination "changes the relationship" between the Ruggieros and the Officers in that a violation of rights had been found."*[24]

Thus the Second Circuit holds that when a jury determines that a constitutional violation has occurred--even when the plaintiff seeks only compensatory relief[25] and the jury finds no damages whatsoever--the legal relationship between the plaintiff and the defendant has changed and the plaintiff has prevailed.

Other circuits have reached essentially the same conclusion as the Second Circuit: that a finding of a violation and an award of nominal damages--unaccompanied by other relief--is sufficient to create prevailing party status.[26] Some of those cases, however, were decided before *Rhodes* or even before *Hewitt*. *Eg., Nephew* (decided before *Rhodes); Garner* (decided before *Hewitt*). The cases decided

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[24] *Garland*, 109 S.Ct. at 1493 (emphasis added).

[25] The opinion does not indicate that the Ruggieros sought anything other than monetary damages. In any event, the opinion makes clear the Ruggieros won no relief from the defendants.

[26] *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir.1988); *Coleman v. Turner*, 838 F.2d 1004, 1005 (8th Cir.1988); *Nephew v. City of Aurora*, 830 F.2d 1547, 1553 n. 2 (10th Cir.1987) (en banc); *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987). *But see Spencer v. General Electric Co.*, 894 F.2d 651 (4th Cir. 1990) *(dicta)*.

after *Hewitt* and *Rhodes* do not discuss or even refer to either case. Instead, the courts rely on pre-*Hewitt* and pre-*Rhodes* circuit-court decisions.[27] Even *Ruggiero* does not discuss or cite *Hewitt* or *Rhodes;* it relies instead on the Supreme Court's opinions in *Garland* and *Hensley*.

In any event, applying the principles set forth in *Hewitt* and applied in *Rhodes,* we are compelled to disagree with the position taken by these circuits, especially as that position is stated in *Ruggiero.* In *Hewitt* the court of appeals determined that the plaintiff's constitutional rights had been violated. But on remand the trial court denied all relief, as the defendants were protected because of official immunity. The Supreme Court held that the plaintiff was not the prevailing party, because "[t]he only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated. The same moral satisfaction presumably results from any favorable statement of law in an otherwise unfavorable opinion."[28] After *Hewitt* but before *Rhodes,* one might have distinguished between a mere "favorable statement of law" and an actual judgment declaring a rights violation. In *Rhodes,* however, the Court extended the *Hewitt* principle to situations in which the plaintiff has secured such a judgment but has failed to win relief from the

[27] *Coleman,* 838 F.2d at 1005 (citing *Smith v. DeBartoli,* 769 F.2d 451 (7th Cir.1985), *cert. denied,* 475 U.S. 1067, 106 S.Ct. 1380, 89 L.Ed.2d 606 (1986)); *Scofield,* 862 F.2d at 766 (citing, *inter alia, Bilbrey v. Brown,* 738 F.2d 1462, 1472 (9th Cir.1988)).

[28] *Hewitt,* 107 S.Ct. at 2676.

defendant. The Court stated that "[a] declaratory judgment ... is no different from any other judgment. It will constitute relief, for the purpose of § 1988, if, and only if, it affects the behavior of the defendant towards the plaintiff."[29]

That a court or jury finds a violation does not, by itself, create prevailing-party status. Rather, to be a prevailing party, a plaintiff must secure a decision that changes the legal relationship between the parties in a way that alters the defendant's behavior toward the plaintiff and that secures some of the relief sought by the plaintiff in bringing the suit. The Farrars have won no such victory.

We reverse the district court's attorney's-fee award and hold that the parties shall bear their own costs.

REVERSED.

REAVLEY, Circuit Judge, dissenting:

While I have difficulty understanding the justification for the finding that Governor Hobby violated plaintiffs' civil rights, that issue has been foreclosed. The majority holds that where plaintiff obtains only nominal damages for his constitutional deprivation, he cannot be considered the prevailing party. I disagree and do not read *Hewitt, Rhodes* and *Garland* to go so far. The plaintiffs prevailed in their claim although the amount of their benefit was only nominal. I do not regard that result as insignificant. I would, however, order reconsideration of the amount of the fee under these circumstances.

[29] *Rhodes,* 109 S.Ct. at 203.

(Filed September 17, 1991)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2830

D.C. Docket No. CA H 75 0987

ESTATE OF JOSEPH D. FARRAR and
DALE LAWSON FARRAR,

Plaintiffs-Appellees,

versus

CLARENCE D. CAIN, ET AL.,

Defendants,

and

WILLIAM P. HOBBY, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

Before REAVLEY, HIGGINBOTHAM and DUHE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the District Court's attorney's-fee award in this cause is reversed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

September 17, 1991

ISSUED AS MANDATE: October 25, 1991

Reavley, Circuit Judge, dissents.

STATUTORY PROVISIONS

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees

. . . In any action or proceeding to enforce a provision of sections 1977, 1978, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-83, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.